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Nos. 87-253 *et al.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,
v.
CHAN KENDRICK, *et al.*

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF UNITED FAMILIES OF AMERICA

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REPLY BRIEF OF UNITED FAMILIES OF AMERICA

I. The District Court Erred In Holding That Religiously Affiliated Organizations Must Be Excluded From Involvement In The AFLA

The question in this case is whether, as the district court held, qualified private organizations must be excluded from participation in an otherwise neutral grant program solely on the basis of religious belief or affiliation. It thus poses a straightforward question of law: does the Establishment Clause require government-funded, privately-administered programs to be *secular*, or does it require the government to be *neutral* between religion and nonreligion? In our opening brief, United Families of America contended that when the government enters a field of social endeavor previously occupied by private (including religious) voluntary associations and provides resources to support and expand those private activities, it must employ neutral, objective, secular criteria for the selection of grantees and distribution of funds. Religious organizations must be neither favored nor disfavored.

By "neutral," we mean, of course, that the program must be neutral with regard to religion. The AFLA is not neutral, nor need it be neutral, with regard to such issues as adolescent sexuality, adoption, or abortion. This Court has confirmed that government is permitted to "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher* v. *Rae*, 432 U.S. 464, 474 (1977). Government promotion of this "value judgment" through the allocation of public funds cannot be challenged under the Establishment Clause on the ground that it "'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris* v. *McRae*, 448 U.S. 297, 319 (1980), quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). The government is not required to be neutral with regard to issues of "traditionalist" morality (448 U.S. at 319)—especially since those issues have significant relation to public health. It is, however, required to be neutral with regard to religion. The government is entitled to promote adolescent sexual self-discipline and adoption as alternatives to "safe sex" and abortion, but it must do so without showing a preference for religious institutions over secular, or secular over religious.

As participants in government-funded programs, religious organizations, like any others, must comply with all lawful statutory and administrative terms of the grant program. In this case, those terms include the requirement that grantees not use AFLA funds to "teach or promote religion." J.A. 757, 759, 761. It is common ground that a few AFLA grantees have violated this restriction, indeed, that some AFLA grantees have been reprimanded and even barred from the program for violations of grant restrictions. It is possible that there have been additional violations, in which case there may need to be additional sanctions against violators. This, we emphasize, is common ground. Where we differ from appellees and the court below, however, is that we believe the First Amendment does not require, but affirmatively pro-

hibits, the government from treating all religiously-affiliated organizations as violators, simply on the basis of their beliefs and affiliations. "The Establishment Clause does not license government to treat religion and those who teach or practice it, *simply by virtue of their status as such*, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) (emphasis added).

Religious organizations are not pariahs, any more than they are paragons. Most of the religiously-affiliated organizations involved in the AFLA have complied with the grant terms and performed valuable public services.[1] There is no basis for excluding them from the program in the absence of appropriate determinations that they have violated the terms of the grant. The issue before this Court is not whether there have been violations, but whether, in the absence of proof, the government must rely on a conclusive presumption that religious organizations are unfit for participation in the AFLA.

a. Appellees' brief attempts to distract from the legal issue in this case by a lengthy and one-sided recital of factaul assertions that were not among the district court's findings of fact. The district court's factual findings were few, largely because the legal theory on which its summary judgment rested—that no religiously-affiliated organizations may participate in government-funded programs related to their religious mission—does not hinge upon particularized findings. On appellate review of a grant of summary judgment, the party opposing summary judgment is entitled to a construction of the facts in the light most favorable to its position, and to resolu-

[1] We especially commend to this Court's attention the *amicus curiae* briefs filed by Catholic Charities, U.S.A., and by the Institute for Youth Advocacy, Covenant House, describing the operation of some of the AFLA grantees that will be defunded if the order below is not reversed.

tion of all disputed issues in its favor. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). Under this standard, it must be assumed that most religiously-affiliated AFLA grantees have provided the secular services the government wishes to promote, without engaging in any diversion of grant funds to proscribed religious uses and without violating any grant conditions. They have done nothing wrong," other than to exercise their constitutionally protected right to believe as their conscience dictates.

Appellees' felt need to supplement the decision below with "facts" not found by the district court powerfully demonstrates the deficiencies in the district court's judgment. If acceptance of appellees' position requires relying on facts not thought material by the district court, then the obvious conclusion, even under their theory of the case, is to remand for further proceedings.

b. More important than these factual deficiencies, however, is the district court's erroneous interpretation of the Establishment Clause. This Court cannot be expected to comb the record in this case to determine, as a factual matter, whether or how many AFLA grantees have violated the grant terms. This Court must, however, determine whether the district court correctly construed the Establishment Clause.

Appellees concede that the district court's decision is not neutral toward religion. Neutrality, appellees assert, is "alluring in the abstract," but is not the goal of the Establishment Clause. App. Br. 56. Instead of neutrality, appellees advocate the following standard: "Governments may not exercise their broad spending power to make outright grants to religious institutions that so much as risk supporting the sectarian mission of those institutions." *Ibid.* This is simply a restatement of the strict "no-aid" theory long disavowed by this Court. See *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *Mueller* v.

Allen, 463 U.S. 388, 393 (1983); *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring). The correct proposition is that "the benefit of government programs and policies [must be] generally available, on the basis of some secular criterion, to a wide class of similarly situated nonreligious beneficiaries." *Marsh* v. *Chambers*, 463 U.S. 783, 809 (1983) (Brennan, J., dissenting). See *Witters* v. *Department of Services*, 106 S. Ct. 748 (1986); *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). To insist that government spending programs never "so much as risk supporting the sectarian mission of those institutions" (App. Br. 56) would require a systematic hostility toward religion. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746-47 (1976) (plurality opinion per Blackmun, J.); *Widmar* v. *Vincent*, 454 U.S. at 274-75.

An organization's "sectarian mission" is inevitably advanced by participation in government benefits, whether they are support for the organization's social welfare activities, tax exemptions for its place of worship, tax deductions or tuition subsidies for its schools, or even police protection for its property. This cannot be decisive. The issue in each case must be whether the government's action is based on truly neutral, objective criteria, not on whether one effect is to benefit religion. If the benefit is extended to an organization without regard to its religious character or affiliation, the benefit does not offend the Establishment Clause, even though it obviously will have the effect of "supporting" the organization's "sectarian mission" of feeding the poor, healing the sick, worship, education, or fellowship.[2]

[2] This is why the parochial school cases have proven so difficult: while the criteria for aid are ostensibly (and perhaps geuinely) secular and neutral, the vast preponderance of recipient institutions are, and are known in advance to be, sectarian. This case is easier to resolve, because the criteria are neutral *and* the recipient institutions are predominantly secular.

In our opening brief (at 27-30), we demonstrated that AFLA funds are distributed on the basis of neutral criteria, without regard to religion, as Congress intended. Indeed, more than 75 per cent of the grantees have no religious affiliation. *Compare* J.A. 748-54 *with* 755-56 (at most 25 of the 100 grantees have religious affiliation). For purposes of appellate review, moreover, the decisive point is that the district court made no finding that the AFLA grants have in any way been "skewed toward religion." *Witters* 106 S. Ct. at 752.[3] On the contrary, the district court concluded, as a matter of law, that the Constitution requires the program to be skewed *against* religion. While it is open to appellees on remand to demonstrate that the Act has not in fact been neutrally administered, the district court's holding that religiously-affiliated organizations must be categorically excluded is wrong in principle.

Perhaps recognizing that neutrality toward religion is not irrelevant, appellees assert four reasons why they believe the AFLA is not neutral. First, they claim that "by requiring religious involvement, the AFLA actually gives a non-neutral preference to religious organizations." App. Br. 57. However, the AFLA does *not* require religious involvement any more than it does the involvement of other community groups. At every point in the statute where "religious organizations" are mentioned, they are included as part of a broad class of community organizations: "religious and charitable organizations, voluntary associations, and other groups in

[3] Evidently aware of the lack of a factual finding on this key point, appellees offer their own assessment of the record. They contend that the record shows that AFLA administrators were biased toward religious organizations in their selection of grantees. See App. Br. 7-10. The district court made no such factual finding, and evidence in the record contradicts it (*see, e.g.*, J.A. 781-83). In any event, resolution of disputed issues of material fact is appropriate for remand and not for this Court on appeal from a grant of summary judgment.

the private sector as well as services sponsored by publicly sponsored initiatives." 42 U.S.C. §§ 300z(a)(8)(B), (10)(C), 300z-5(a)(21). All community organizations —public and private, religious and secular—are to be involved "as appropriate." As the Senate Report states: "Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents." S. Rep. 97-161, 97th Cong., 1st Sess. 15-16 (1981).[4]

Second, appellees observe that "the AFLA is a competitive grant program," but they do not explain why this makes it "decidedly *non*-neutral." App. Br. 57. The question is whether the competition is based on objective, secular criteria. Since more than three quarters of the "winners" of the "competition" are nonreligious, this suggests that the program is in fact neutral.

Third, appellees assert that "only religious organizations that adhere to certain beliefs regarding reproduction, abortion, and chastity are eligible for AFLA funding." App. Br. 57. This assertion is both untrue and logically misleading. It is untrue because AFLA restric-

[4] Appellees' repeated assertion that the AFLA requires the involvement of religious organizations (*e.g.*, App. Br. 1, 2, 3) contradicts the district court's interpretation of the statute (U.S. J.S. App. 21a) (emphasis added):

> Title VI was amended not only to add religious organizations to the list of entities that *may* participate in AFLA programs, but also to add families, charitable organizations, voluntary associations, and other groups. *See* 42 U.S.C. § 300z-5(a)(21)(B). Religious organizations are only one of five types of entities that *may be* involved in an AFLA program.

Of course, Congress intended religious groups—along with others—to be involved as appropriate, but that is a far cry from appellees' statement that the "AFLA's mandates on religious involvement give religion a preference over nonreligion." App. Br. 31.

tions are not based on a grantee's "beliefs," but only on its willingness to abide by law in its administration of AFLA projects. As the district court stated, "[b]y prohibiting a grant recipient from advocating abortion in an AFLA program or project, the AFLA did not condition a 'benefit' on a particular religious belief but merely restricts a *program or project* from using federal tax dollars to advocate a particular course of action." U.S. J.S. App. 14a-15a (emphasis in original). A grantee can believe whatever it wishes, and can conduct its affairs—other than the AFLA project—however it wishes. Appellees' assertion is logically misleading because it implies that to be "neutral" the government must engage in programs that are equally desirable to every religious sect. This is not the meaning of neutrality. That some religions advocate feeding the poor while others believe in the sanctity of work and self-reliance for the able-bodied, for example, does not make grants for feeding programs "non-neutral" in a constitutional sense. Government is neutral, in this context, if its program requirements are set on a neutral, secular basis and all organizations are eligible for participation without discrimination on the basis of religion. *Gillette* v. *United States*, 401 U.S. at 437 (1971).

Ironically, the program appellees support, which would require grantees to provide the full range of pregnancy-related services (see App. Br. 21-22), would be unconstitutional under the standard they espouse in this case. Participation in such programs would be open only to religious organizations that are willing to provide abortion and artificial contraception, just as the AFLA is open only to those willing to foster sexual self-discipline and adoption. Under appellees' theory of the case, Title X of the Public Health Services Act, 42 U.S.C. § 300a (1982), the nation's largest family planning program, is constitutionally indistinguishable from the AFLA and must be struck down if the decision below is affirmed. Title X makes grants to private organizations, including

churches,[5] for provision of services, notably contraceptive services and counselling, that accord with some (but not all) religious doctrines.

The fourth, and "perhaps most important[]," reason appellees claim the AFLA is "*non*-neutral" is that "the ultimate beneficiaries, the targeted adolescents, are presented with government sponsored, religiously dictated medical services and education, regardless of the personal religious beliefs of the adolescent." App. Br. 57. This is a strange contention indeed. In a world of differing views, the only way that "targeted adolescents" can exercise a choice in the philosophy of the service provider is if the widest possible array of grantees is permitted, consistent with the purposes of the statute.

This point merits ela[illegible]ion, for its identifies a principal philosophical difference between appellees and ourselves. We believe that in an area of great sensitivity, upon which there are many differing moral, political, religious, medical, and practical points of view, the public policy most consistent with the pluralistic vision of the First Amendment is for the government to extend funding to as broad and diverse a range of private and community associations as may contribute to the statute's secular objective. It is better—fairer, more neutral, more effective—for the government to facilitate a wide variety of private and community organizations, each of them free to approach the statutory objective in its own way, rather than to attempt to impose a secular perspective on a diverse society.

Religious pluralism has advantages for practical as well as theoretical legal reasons. A significant subsection within our society is unreceptive to forms of "sex education" they believe to be inimical to their religious beliefs. Unless a program such as the AFLA can work within a

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[5] See HHS, *Family Planning Grantees, Delegates, and Clinics* (1987/1988 Directory) (listing religious organizations as among the Title X grantees).

context that they can trust, the children within these groups will not be permitted to participate, with potentially grave consequences to their own well-being and the goals of the program. Only a program that works with the cooperation of trusted intermediary institutions, such as churches and community groups, will be effective in reaching out to the many diverse elements of the United States population in ways they can understand and appreciate.

Appellees, in contrast, contend that the government has no option other than to insist on a homogeneous secular approach to these moral questions, an approach that does not reflect the religious and philosophical variety of our people. Appellees complain, for example, that federal funds were used "to structure and then teach from curriculums that were designed to be compatible with particular religious beliefs" (App. Br. 34), and that one secular grantee stated that it would not "contradict [that] which is taught at home or in church" (*id.* at 11) —as if the Constitution required a studied insensitivity and intolerance toward religion. Appellees castigate two secular grantees, the Southeast Missouri Association of Public Health Administrators (SeMo) and Memorial General Hospital of West Virginia, for helping teenagers and their families to learn to discuss pregnancy-related issues in terms of "their own values." *Id.* at 10, 11. The predictable result of appellees' approach would be a program less respectful toward individual religious beliefs, with less freedom of choice for adolescent beneficiaries, less diversity, and less effective communication with those portions of the population who do not speak the language of secularized morality.

We can think of no less intrusive way for the federal government to promote sexual self-discipline and related statutory purposes than to encourage individuals, families, and private associations, including churches, to deal with these issues in terms of *their own* values. Certainly, this is far superior to imposing secular values

upon all participants in the program. There is a difference between promoting religion and being sensitive to the religious background many families bring to these issues. Nothing in the Constitution requires government-funded grantees to be indifferent or hostile to the religious values of the people they are asked to help. *Zorach* v. *Clauson*, 343 U.S. 306, 313-14 (1952).

c. Appellees concede that religious organizations are not, and should not be, categorically excluded from participating in government-funded social welfare programs, such as those to feed the hungry or house the poor. App. Br. 1-2, 53.[6] They attempt to distinguish the AFLA, however, apparently on the ground that the AFLA constitutes a form of education—more specifically "sex education"—and is therefore closer to parochial school aid than to social welfare programs. App. Br. 48-49, 53. Putting aside for the moment the fact that many AFLA services have nothing to do with sex or any other education,[7] appellees fail to respond to any of the reasons set forth at length in our opening brief (at 45-47) for why parochial school aid has been consistently treated by this Court under an especially stringent standard. To review those reasons: (1) parochial school aid is directed to a class of institutions that are overwhelmingly religious in nature, rather than to a genuinely neutral class of recipient institutions; (2) parochial school aid decisions have, without exception, been predicated on a factual finding that the recipient institutions were "pervasively sectarian"; and (3) parochial schools are designed to create a total environment in which religious teaching is incorporated into a sustained, comprehensive education covering virtually all aspects of life. These are the reasons why the *Lemon* test invalidates most forms of aid to

[6] Appellees' position on this is not consistent through the brief. With the statements cited in text, compare, *e.g.*, App. Br. 54 (the "constitutional dividing line between [parochial] schools and institutions providing 'social welfare services' . . . does not exist").

[7] See our opening brief, at 47-49.

parochial schools while upholding neutral aid to discrete religious social welfare functions. None of these reasons apply to the AFLA, in which most grantees are secular, many of the religiously-affiliated grantees are far from being "pervasively sectarian," and the services are discrete and unconnected to any larger program of religious education.

Appellees' distinction between the AFLA and other social welfare activities is rooted in their conviction that "these issues are of fundamental religious importance." App. Br. 36. Indeed, appellees understand the AFLA as constituting "government fund[ing] [of] both religious institutions and secular institutions to promote religious beliefs." App. Br. 30. *See also* App. Br. 4 (the AFLA makes "instructions and indoctrination of certain values concerning sexuality a major component of the Act"). It is not so much the affiliations of the grantees as the nature of the statutory objective to which appellees object. Appellees' distinction between the AFLA and other social welfare programs is rooted in their fundamental disagreement with *Maher* v. *Roe* and *Harris* v. *McRae*. They cannot accept that, from an Establishment Clause perspective, the encouragement of adolescent sexual self-discipline and adoption is a secular purpose. But if they were right—if sex education were intrinsically a religious matter—the proper result would be to forbid the government from entering the field at all.[8]

It is only on the premise that teaching adolescents about sexuality is a legitimate secular enterprise that sex education is constitutionally permissible at all. And if it is a legitimate secular enterprise, there is no reason why nonreligious organizations should be favored over religious. Indeed, the more sensitive the subject matter,

[8] And it is important for these purposes to recall, as appellees point out (App. Br. 24 & n.54), that sex education encouraging contraception and abortion is no less "religious" than the opposite. Some religions take one view, some religions take the other.

the more important it is to treat it without bias for or against religion.

d. Appellees are rightly concerned about the appearance of endorsement of religion. App. Br. 1, 22-24. They completely disregard, however, the equal and opposite danger of an appearance of disapproval of religion. See *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The ideal statute is one that *includes* religious organizations, but without special place or recognition. The AFLA, we submit, is such a statute. Congress took great care to refer to religious organizations *only* as among a broad array of charitable and voluntary associations, public and private. As this Court has observed, "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch* v. *Donnelly*, 465 U.S. 668, 680 (1984). Viewed in the larger context of predominantly secular grantees under the AFLA—and especially in the context of the panoply of federal family planning programs that take a different approach from the AFLA—no reasonable observer would conclude that the inclusion of some religiously-affiliated grantees under this statute sends a message of endorsement of religion over nonreligion.

e. In our opening brief, we showed that, even under the more restrictive criteria applicable to programs that are not genuinely and reliably neutral in their distribution of funds, the district court's order was overbroad in three respects. First, it excluded potential participants on the basis of mere religious affiliation—sometimes quite nominal—rather than confining its proscription to organizations so "pervasively sectarian" that they could not separate religious from nonreligious activities (pages 37-40). Second, it excluded organizations without any finding that they had used AFLA funds for "specifically religious" purposes (pages 40-43). Third, it prohibited religious organizations from providing even those non-

educational care services that are inherently nonsectarian and nonideological, such as pregnancy testing, housing, health and nutrition, and adoption services (pages 47-49).

Nothing in appellees' brief contradicts our contention that the district court's judgment is at best overbroad. To be sure, appellees attempt in their brief to supply the factual findings so lacking in the district court's opinion. The district court expressly declined to rule on whether any individual grantee was "pervasively sectarian" (U.S. J.S. App. 23a-25a). Appellees compensate by offering their opinion (dressed up as fact) that three of the grantees, St. Margaret's, St. John's, and Brigham Young University, are "pervasively sectarian." App. Br. 42.[9] Similarly, appellees assert that AFLA funds were used for "specifically religious activit[ies]" (App. Br. 33-34, quoting *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973)), referring to several alleged incidents that the district court did not mention and about which the district court made no findings of fact. (Like the district court, appellees simply ignore the existence of inherently nonsectarian services funded under the Act.) It is possible that appellees may be correct about these and other factual assertions, but the assertions of a party to the litigation are no substitute for judicial fact-finding.

In any event, most of the charges appellees have culled from the record are wholly immaterial to the issue whether grantees have used AFLA grant funds to promote religion. Appellees' characterization of the facts must be read with a skeptical eye. While there is neither need nor space for a point-by-point analysis, we would observe that most of appellees' alleged abuses consist of one of the following: (1) the content of grant *applications*, with no showing that the specifically religious aspects were approved or carried out;[10] (2) religious activities by *paricipants* in the programs, as opposed to *grantees*;[11] (3) religious activities by grantees *outside* the AFLA program, at their own expense;[12] (4) presentations by grantees to religious audiences, whatever their content;[13] (5) religious motivations of AFLA grantees, with no showing of the teaching or promotion

[9] Appellees do not attempt to defend the district court's unprecedented theory, discussed in our opening brief (at 37 n.22), that it had no need to determine whether AFLA grantees were "pervasively sectarian."

[10] *E.g.*, App. Br. 15 n.34 (application of Catholic Social Services of Wayne County); *id.* at 15 (application of Families of the Americas Foundation). In one instance involving Catholic Charities of the Diocese of Arlington (App. Br. 18), appellees recount at length problems with *proposed* curriculum, even though the record shows (J.A. 112-13), and appellees admit that prior to final approval HHS officials contacted the applicant and "obtained assurances" that AFLA funds would not be used to teach the problematic curriculum. App. Br. 19.

[11] For example, appellees state that "[t]he government has funded grantees . . . to provide programs that included the 'Biblical and theological views regarding sex,'" (App. Br. 29-30), when in fact the reference in the record is to a Presbyterian church group that requested a presentation from a secular grantee (the Northwest Regional Health Center of Shreveport, Louisiana), which the youth group leader said he would follow "by a brief presentation *by myself* on Biblical and theological views regarding sex." J.A. 568 (emphasis added). Surely it is not a violation of the Establishment Clause for religious groups to educate their own members about the religious dimensions of sexuality.

[12] See, *e.g.*, App. Br. 14 & n.30 (discussing Providence Hospital's "Rainbow" program, although only its secular counterpart, the "Pathways" program, was funded under the AFLA).

[13] See, *e.g.*, App. Br. 12 n.24 (Maternal and Child Health Program of the State of Hawaii provided "church and counseling based efforts at reaching families"); *id.* at 15 n.34 (Catholic Social Services of Wayne County intended to make presentations to religious groups); *id.* at 11 n.23 (Memorial General Hospital of West Virginia conducted workshops in church facilities for children and their Sunday School teachers).

of religion in the programs;[14] or (6) opposition to abortion or artificial contraception.[15] Very few of appellees' factual assertions point directly to AFLA-funded, "specifically religious" activities designed to "teach or promote religion."

II. The District Court's Severability Ruling Is Correct On Severability Principles But Should Be Reversed On Constitutional Grounds

In its order of August 13, 1987, the district court held that "the AFLA's references to 'religious organizations' are severable from the statute and that the remainder of the AFLA is fully operable as law in a manner consistent with the intent of Congress." U.S. J.S. App. 53a. Appellees took a cross-appeal from this aspect of the judgment. While their argument on severability principles is wholly without merit, we agree on constitutional grounds that the AFLA cannot be enforced in the form it was rewritten by the district court.

If Congress were to pass a statute authorizing grants to private organizations "except those affiliated with religion," the statute would be plainly unconstitutional under the Free Exercise Clause and the equal protection component of the Due Process Clause. While the *conduct* of individuals or organizations is subject to state regulation, the freedom to *believe* is absolute. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940). Long before this Court first recognized the right of believers to certain exceptions from government practices that burden the free exercise of religion, see *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Free Exercise Clause protected individuals and groups from being penalized by the government on account of their religious belief, character, or affiliation. *Davis* v. *Beason*, 133 U.S. 333, 342-43 (1890); *Reynolds* v. *United States*, 98 U.S. 145, 166-67

[14] See, *e.g.*, App. Br. 15 & n.32 (Family of the Americas Foundation was "inspired by the Encyclical *Humane Vitae*"); *id.* at 14 n.31 (grantee's description of its "philosophical orientation").

[15] See App. Br. 19-22.

(1879); see *McDaniel* v. *Paty*, 435 U.S. 618, 626 (1978); *id.* at 635 n.8 (Brennan, J., concurring).[16] Organizations may be barred from government programs because they do not comply with the statutory or administrative requirements, but they cannot be barred because they are religious. As rewritten by the district court, the AFLA imposes a stiff financial penalty on organizations for religious affiliation, in plain violation of the Free Exercise Clause.[17]

It is far preferable from the point of view of the First Amendment for the federal government to leave the field of sexuality instruction to the private institutions of choice than it is to skew the discussion in favor of nonreligious over religious perspectives. If the issues at hand are "inseparable from religious dogma," as the district court concluded (U.S. J.S. App. 36a), it is no solution to say that the government will subsidize only the secular perspective. This is not a subject for which a secular treatment can be said, realistically, to be neutral. A secular orthodoxy about issues of moral and religious import is no less offensive under the First Amendment than a religious orthodoxy.

The district court erred in rewriting the statute to exclude otherwise qualified organizations on the basis of religious affiliation. Unlike Congress's AFLA, which strove to involve the full range of "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" (42 U.S.C. § 300z-5(a)(21)), the district court's rewritten statute explicitly

[16] Indeed, the roots of this principle are older even than the First Amendment. The Constitution's Article VI states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." It cannot be that the same Constitution imposes a religious test (in this case, a *non*religious test) in order to be an AFLA grantee.

[17] Alternatively, the violation may be conceptualized as one of the equal protection component of the Due Process Clause. See *McDaniel* v. *Paty*, 435 U.S. at 643-46 (White, J., concurring).

discriminates on the basis of religious belief and brands some citizens as "outsiders, not full members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

CONCLUSION

The district court's summary judgment invalidating the AFLA insofar as it involves religious organizations should be reversed. If that judgment is affirmed, then the court's ruling that AFLA funding of only nonreligious organizations may continue should be reversed under the Free Exercise Clause.

Respectfully submitted.

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